PAI SAN & ORS

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
[CRIMINAL APPEAL NO: P-05-47-98]
25 OCTOBER 2002

CRIMINAL PROCEDURE: *Prosecution - Authority to conduct prosecution - Validity of prosecution conducted by officer from fisheries department - Whether consent to prosecute given by Public Prosecutor under s. 38(1) Exclusive Economic Zone Act 1984 good in respect of offence under s. 15(1) Fisheries Act 1985 - Whether Fisheries Act 1985 must be read together with Exclusive Economic Zone Act 1984 - Whether s. 38(1) Exclusive Economic Zone Act 1984 ultra vires art. 145(3) Federal Constitution - Whether fisheries officer lawfully authorised to conduct prosecution*

CONSTITUTIONAL LAW: *Prosecution - Prosecution by authority other than Public Prosecutor - Validity of prosecution conducted by officer from fisheries department - Whether consent to prosecute given by Public Prosecutor under s. 38(1) Exclusive Economic Zone Act 1984 good in respect of offence under s. 15(1) Fisheries Act 1985 - Whether Fisheries Act 1985 should be read together with Exclusive Economic Zone Act 1984 - Whether s. 38(1) Exclusive Economic Zone Act 1984 ultra vires art. 145(3) Federal Constitution - Whether s. 38(1) Exclusive Economic Zone Act 1984 preserves exclusive power of Public Prosecutor to institute or to consent to criminal proceedings - Whether fisheries officer lawfully authorised to conduct prosecution*

The appellants were tried under s. 15(1) of the Fisheries Act 1985 ('FA85') for fishing illegally in Malaysian waters. At the end of the prosecution's case, counsel for the appellants applied to the magistrate for a stay of proceedings in order to refer to the High Court a question of law respecting the validity of the prosecution which was being conducted by an officer of the fisheries department. The magistrate refused the application and the appellants applied to the High Court. This was an appeal from the decision of the High Court dismissing the appellants' application.

Held:
Per Abdul Hamid Mohamad JCA

[1] The FA85 should be read together with the Exclusive Economic Zone Act 1984 ('EEZA84'). Both the Acts are interconnected; they contain cross-references to each other and have overlapping provisions. Thus, as the appellants were charged under s. 15(1) of the FA85, s. 38 of the EEZA84 also came into play. (pp 556 g-h, 557 a-i, 558 a-h, 559 a-h & 560 a-h)

[2] Section 38(1) of the EEZA84 states that "A prosecution for an offence under this Act or any applicable written law shall not be instituted except by or with the consent of the Public Prosecutor …". Clearly, the words "or any applicable written law" contemplate, *inter alia*, prosecutions in respect of offences under the FA85. (pp 556 g-h, 557 a-i, 558 a-h, 559 a-h & 560 a-h)

[3] Unlike the provisions of some other statutes, s. 38(1) of the EEZA84 does not attempt to usurp the powers of the Public Prosecutor. It does not abrogate the powers vested in the Public Prosecutor by art. 145(3) of the Federal Constitution, or confer parallel powers upon another person or authority. Section 38(1) of the EEZA84 preserves the power of the Public Prosecutor to institute or to consent to criminal proceedings; it is consistent with art. 145(3) of the Federal Constitution and, therefore, valid. Accordingly, the consent given by the Public Prosecutor to the fisheries officer under s. 38(1) of the EEZA84 to prosecute the appellants was valid. The officer was lawfully authorised to conduct the prosecution. (pp 556 g-h, 557 a-i, 558 a-h, 559 a-h & 560 a-h)

[Appeal dismissed; trial to proceed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu telah dibicarakan di bawah s. 15(1) Akta Perikanan 1985 ('FA85') kerana menangkap ikan secara salah di sisi undang-undang di perairan Malaysia. Pada penghujung kes pihak pendakwaan, peguam bagi pihak perayu-perayu telah memohon kepada majistret untuk satu penggantungan prosiding demi untuk merujuk kepada Mahkamah Tinggi satu persoalan undang-undang berkenaan keesahan pendakwaan yang dikendalikan oleh seorang pegawai dari jabatan perikanan. Majistret telah menolak permohonan tersebut dan perayu-perayu telah memohon kepada Mahkamah Tinggi. Ini adalah satu rayuan daripada keputusan Mahkamah Tinggi yang menolak permohonan perayu-perayu.

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] FA85 haruslah dibaca bersama dengan Akta Zon Ekonomi Eksklusif 1984 ('EEZA84'). Kedua-dua Akta tersebut adalah saling berkaitan; mereka mengandungi rujukan-rujukan bersaling dengan satu dan yang lain dan mempunyai peruntukan-peruntukan bertindih. Oleh itu, oleh kerana perayu-perayu adalah dituduh di bawah s. 15(1) FA85 tersebut, maka s. 38 EEZA84 juga digunakan.

[2] Seksyen 38(1) EEZA84 tersebut menyatakan bahawa "A prosecution for an offence under this Act or any applicable written law shall not be instituted except by or with the consent of the Public Prosecutor …". Jelasnya perkataan-perkataan "or any applicable written law" mengura-urakan, antara lainnya, pendakwaan-pendakwaan berhubung dengan kesalahan-kesalahan di bawah FA85.

[3] Tidak seperti peruntukan-peruntuklan beberapa statut yang lain, s. 38(1) EEZA84 tidak cuba untuk merampas kuasa-kuasa Pendakwa Raya. Ianya tidak mengabrogasikan kuasa-kuasa yang diletakhak pada Pendakwa Raya oleh per. 145(3) Perlembagaan Persekutuan, atau memberikan kuasa yang selari ke atas seorang yang lain atau pihak berkuasa yang lain. Seksyen 38(1) EZA84 mengekalkan kuasa Pendakwa Raya untuk memulakan atau membenarkan prosiding jenayah; ianya konsisten dengan per. 145(3) Perlembagaan Persekutuan dan, oleh itu, adalah sah. Sehubungan itu, kebenaran yang diberikan oleh Pendakwa Raya kepada pegawai perikanan di bawah s. 38(1) EEZA84 untuk mendakwa perayu-perayu adalah sah. Pegawai tersebut telah diberi kuasa secara sah di sisi undang-undang untuk mengendalikan pendakwaan tersebut.

Rayuan ditolak; perbicaraan hendaklah diteruskan.]

Case(s) referred to:
Kyohei Hosoi v. PP [1998] 1 CLJ 1063 ***(dist)***
Nguang Chan Sdn Bhd v. PP [2001] 2 CLJ 16 ***(dist)***
PP v. Lee Ming & Anor [1999] 1 CLJ 379 ***(dist)***
PP v. Manager, MBf Building Services Sdn Bhd [1998] 1 CLJ 678 ***(refd)***
Quek Gin Hong v. PP [1998] 4 CLJ Supp 515 ***(dist)***
Rajendran M Gurusamy v. PP [2001] 1 CLJ 631 ***(dist)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(dist)***

Legislation referred to:
Criminal Procedure Code, s. 380(ii)(b)
Environmental Quality Act 1974, ss. 25, 37, 44
Environmental Quality (Clean Air) Regulations 1978, reg. 12
Exclusive Economic Zone Act 1984, ss. 2, 3(1), 6, 7, 8, 38
Federal Constitution, art. 145(3)
Fisheries Act 1985, ss. 2, 15(1), 19, 24(1), 25(a)
Forests Ordinance (Cap 126) (Sarawak), s. 92A
Immigration Act 1959/1963, s. 58(1), (2)
Road Transport Act 1987, ss. 116, 119(2)
Securities Commission Act 1993, s. 39
Securities Industry Act 1993, s. 126
Trade Description Act 1972, ss. 26(2), (3), 28B(3)

For the appellants - En Rajasingam (Raj Shanker); M/s R Rajasingam & Co
For the respondent - A Karim A Jalil (Nurulhuda Nur'aini Mohd Nor)

[Appeal from High Court, Pulau Pinang; Criminal Application No: 44-4-98]

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellants were charged at the Balik Pulau Magistrate's Court for fishing in the Malaysian waters without an international agreement allowing the same nor a valid permit issued under s. 19 of the Fisheries Act 1985, thereby committing an offence under s. 25(a) of the Act.

At the end of the prosecution's case, the appellants were called upon to enter upon their defences. At that stage, learned counsel for the appellants applied to the court (the Magistrate's Court) that the trial be stayed and that the records of the proceedings be referred to the High Court for the determination of a question law on the validity of the prosecution which was conducted by an officer of the Fisheries Department, which was alleged to be void and unconstitutional. The learned magistrate refused the application.

The appellants then filed a notice of motion in the High Court at Penang (Permohonan Jenayah No. 44-4-98). The appellants prayed for the following orders:

a) that the prosecution of a charge under the Fisheries Act can only be conducted by the Public Prosecutor;

b) that the prosecution conducted by an officer of the Fisheries Department is void and *ultra vires* the Federal Constitution and that such proceedings are unlawful;

c) that all orders made by the magistrate in the case be set aside;

d) that all the accused persons in the case (the appellants) be acquitted ("dibebaskan");

e) any other order(s) that the court deems fit and proper to make.

It is to be noted that the challenge is on the power of the Fisheries Officer to conduct the prosecution.

The learned judge dismissed the application. The appellants appealed to this court.

Judgment Of The Learned High Court Judge

The learned judge addressed his mind to two issues. First, whether the consent ("izin") to prosecute given by the deputy public prosecutor (P1) was a valid consent. Secondly, whether the Fisheries Officer was authorized to conduct the prosecution of the appellants for the offence for which they were charged.

The first issue became relevant because the learned counsel for the appellants had argued that the consent had no legal effect because there was no provision in the Fisheries Act 1985 for the public prosecutor to give the consent.

On this question, the learned judge was of the view that, reading together the provisions of ss. 6, 8 and 38 of the Exclusive Economic Zone Act 1984 and s. 15(1) of the Fisheries Act 1985, consent of the public prosecutor was required for the prosecution of the appellants. That consent was given. The learned judge was also of the view that s. 38(1) of the Exclusive Economic Zone Act 1984 exists side by side and in harmony with the provision of art. 145(3) of the Federal Constitution. The learned judge concluded that the consent (P1) was valid and not unconstitutional.

On the second issue, learned counsel for the appellants and the deputy public prosecutor agreed that if the offence was a non-seizable offence, the Fisheries Officer had the power to prosecute. On the issue whether the offence was a non-seizable offence or not, the learned judge decided that it was a non-seizable offence.

The Appeal

Learned counsel for the appellants submitted that the crux of the appeal is whether a prosecution conducted by an officer from the Fisheries Department, particularly for an offence under s. 15(1) read together with s. 24(1) and punishable under s. 25(a) of the Fisheries Act 1985 is valid. In other words, the question is whether the officer was properly authorized to conduct the prosecution.

The learned counsel submitted that as there was no provision in the Fisheries Act 1985 authorizing the officer to prosecute, the Fisheries Act 1985 should not be read together with the Exclusive Economic Zone Act 1984, the prosecution had to rely on the provisions of s. 380(ii)(b) of the Criminal Procedure Code (prior to the amendment by the Criminal Procedure (Amendment) Act 1998 which came into effect on 1 April 1998), that s. 380(ii)(b) of the Criminal Procedure Code was *ultra vires* the constitution and, therefore, the officer was not authorized to prosecute and the prosecution was null and void.

Article 145(3) of the Federal Constitution reads:

> 145. (1) …
>
> (2) …
>
> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court – martial.

We shall now look at the case law. We begin with *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740 (2 October 1997). The first thing that should be noted about that case is that, even though it is a decision of Gopal Sri Ram, a judge of the Court of Appeal, it is a judgment of the High Court. The learned judge sat as a High Court judge to hear a reference by the Sessions Court.

That case concerns the constitutionality of s. 126 of the Securities Industry Act 1993 and s. 39 of the Securities Commission Act 1993.

Section 126 of the Securities Industry Act 1993 reads:

> 126 (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.
>
> (2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Commission.

Section 39 of the Securities Commission Act 1993 reads:

> 39 (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) Any officer of the Commission authorized in writing by the Chairman may conduct any prosecution or any offence under this Act.

The learned judge held:

> Therefore, the impugned sub-sections are *ultra vires* Article 145(3) of the FC save as follows. Section 126(2), to the extent that it allows the Registrar of Companies (Registrar) to conduct a prosecution, is not *ultra vires* Article 145(3) of the FC, because such Registrar is normally a senior member of the Judicial and Legal Service who is normally gazetted as a Deputy Public Prosecutor (DPP). The Registrar therefore conducts the prosecution of an offence under the SIA in the capacity of a DPP. (See p. 749, e-i)
>
> However the Chairman of the SC is not on an equal footing and cannot authorise or conduct prosecutions under the SIA. (See p. 749, e-i)
>
> Section 39(2) of the SCA is void and unconstitutional as it wholly contravenes Article 145(3). (See p. 750, f).

It must be noted that the learned judge also held that the provisions of s. 126(2) "as originally cast" did not contravene art. 145(3), because of the careful way in which it was drafted.

It should be emphasised that the offending part of the new sub-s. (2) of s. 126 of the Securities Industry Act 1993 is that part that gives power to the Chairman of the Commission to authorize an officer to prosecute. On the other hand, under the old sub-s. (2) of s. 126, the conduct of a criminal prosecution by an advocate and solicitor "with previous permission in writing of the Public Prosecutor" is valid. The determining factor is the existence of the "permission in writing of the Public Prosecutor." In other words, so long as that permission emanates from the Public Prosecutor, the provision is valid. The Chairman of the Commission or anybody else should not usurp the function of the Public Prosecutor provided by art. 145(3).

The next case is *PP v. Manager, MBf Building Services Sdn. Bhd.* [1998] 1 CLJ 678 (3 December 1997). In that case the defendant was charged with two offences under the Environmental Quality Act 1974. The Defendant objected to the proceedings on a preliminary point that no prosecution could be had against the defendant because the Act did not contain a provision providing for a sanction by the Attorney General to institute proceedings for offences under the Act. It was argued that the defendant could not be prosecuted for the offences as the Director General of Environmental Quality had no power to institute such proceedings. In other words, there should be a provision in the Act for either the sanction or

consent of the Attorney General to institute criminal proceedings, otherwise it would allow a person other than the Attorney General to institute such proceedings and that is unconstitutional.

KC Vohrah J (as he then was) held that the lack of a provision in the Act providing for sanction by the Attorney General or his consent to institute proceedings for offences under the Act did not invalidate the Act.

The next case, in chronological order, is *Kyohei Hosoi v. PP* [1998] 1 CLJ 1063 (8 December 1997). This is a judgment of Augustine Paul JC (as he then was). In that case, the impugned section was s. 58(2) of the Immigration Act 1959/1963 which reads:

> 58 (1) …
>
> (2) No prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy.

The sanction to prosecute in that case was given by the Director General. So, following *Repco*, the learned Judicial Commissioner (as he then was) held that that subsection, in so far as it empowered the Director General to sanction the institution of a prosecution, was void.

Again it should be noted that what makes it void is the giving of the power to the Director General to sanction the institution of a prosecution, parallel to that of the Public Prosecutor. In simple words, do not take away the powers of the Public Prosecutor and give it to somebody else.

The next case is *PP v. Lee Ming & Anor* [1999] 1 CLJ 379 (29 June 1998). This is a judgment of Ian Chin J. The provision in question is s. 92A of the Forests Ordinance (Sarawak Cap. 126) which reads:

> 92A. Prosecution in respect of offences under this Ordinance or by any subsidiary legislation made hereunder may be conducted by:
>
> (a) The State Attorney General or any legally qualified officer authorized by him;
>
> (b) The Director; or
>
> (c) Any forest officer or any other public officer generally or specially authorized in that behalf by the Director.

The learned judge held that, following *Repco Holdings Bhd.*, that section was unconstitutional, null and void as it allowed persons other than the Federal Attorney General to institute, conduct or discontinue proceedings for an offence.

About two months later, Suriyadi J decided the case of *Quek Gin Hong v. Public Prosecutor* [1998] 4 MLJ Supp 161. In that case the accused was charged for allowing open burning of certain vegetation waste without a license contrary to reg. 12 of the Environmental Quality (Clean Air) Regulations 1978. He was convicted and sentenced to six months' imprisonment. On revision, it was, *inter alia*, argued that s. 44 of the Environmental Quality Act 1974 was *ultra vires* art. 145(3) of the Federal Constitution. Section 44 provides:

> 44. Prosecution in respect of offences committed under this Act or regulations made thereunder may be conducted by the Director General or any officer duly authorized in writing by him or by any officer of any local authority to which any powers under this Act has been delegated.
>
> Held, setting aside the order and acquitting the accused:
>
> (1) Section 44 of the Act which endowed the Director General with powers at par with the Public Prosecutor was void for inconsistency with art. 145(3) of the Federal Constitution (see pp. 164H-I and 165A); *Repco Holdings Bhd v. PP* [1997] 3 MLJ 681 followed. Therefore, any documented authorization emanating from the Director General was worthless and would not validate any shortcomings in the want of authority to prosecute (see p 165G-H).

In *Rajendran a/l M. Gurusamy v. PP* [2001] 1 CLJ 631 (19 July 2000), the applicant was charged with an offence under s. 119(2) of the Road Transport Act 1987. The applicant objected before the magistrate that the police were not authorized by the Public Prosecutor to institute the proceedings. The relevant provision is s. 116 of the Act which provides:

> 116. Proceedings for an offence against this Act shall not be instituted or conducted except by or on behalf of the Public Prosecutor or by a police officer or traffic warden, Dato Bandar or a road transport officer, or as respects prosecution for an offence against any order or rules made by an appropriate authority under Part III, by an officer of that appropriate authority.

Abdul Wahab J held:

> Section 116 of the Road Transport Act envisaged that institution and conduct of prosecutions for offences under the Act and regulations thereunder by persons other than the Public Prosecutor …
>
> To that extent it offends against the sole authority interpretation of *Repco Holdings Bhd v. PP*.

We now come to the judgment of this court in *Nguang Chan Sdn. Bhd. v. PP* [2001] 2 CLJ 16. The impugned section was s. 28B(3) of Trade Description Act 1972 that reads:

> (3) Any prosecution in respect of an offence under this Act may be conducted by an Assistant Controller.

Sections 26(2) and (3) of that Act, which was also considered, provides:

> (2) The Controller shall subject to the general direction and control of the Minister have supervision in all matters relating to the enforcement of this Act and the Controller and the Deputy Controller shall perform such duties and exercise such powers and functions conferred upon him and upon an Assistant Controller by this Act.
>
> (3) All officers appointed under this section shall be deemed to be public servants within the meaning of the Penal Code applicable.

This court held that s. 28B(3) was *ultra vires* art. 145(3) of the Federal Constitution. Lamin Mohd. Yunus PCA, delivering the judgment of the court said:

> There is nothing to suggest from s. 28B(3) of the Trade Descriptions Act 1972 that the Assistant Controller when acting under subsection (3) that he is obliged to get either written authorisation or consent from the Attorney-General or any Deputy Public Prosecutor. It appears he is allowed to act independently. However he is under general "supervision" by the Controller who in turn the Controller himself is under "the general direction and control of the Minister" when performing his functions such as supervising "in all matters relating to the enforcement of this Act." (see s. 26(2))

It must be noted that in that case the prosecution was conducted by the Assistant Controller under a purported authority given to him by s. 28B(3) of that Act. He acted independently of the Public Prosecutor.

In our view, the judgments of the courts have been quite consistent. A provision giving the power to institute, conduct or discontinue a proceeding for an offence is unconstitutional and void if it is exercisable independently of, or if it is parallel to the powers vested in the Public Prosecutor by art. 145(3) of the Federal Constitution. Any authorization given pursuant to such (void) provision is void and the prosecution instituted and conducted by a person so authorized is void. However, so long as the power given to another person is subject to the powers of the Public Prosecutor under art. 145(3) of the Federal Constitution, it is valid.

What is the position in the present case? First, there is no provision in the Fisheries Act 1985 empowering an officer of the Fisheries Department to conduct the prosecution under the Act. Therefore, looking at that Act alone, the power for an officer of the Fisheries Department to conduct a prosecution must come from the Criminal Procedure Code, if any.

However the learned Deputy Public Officer argued (the learned judge agreed with him) that the Fisheries Act 1985 must be read together with the Exclusive Economic Zone Act 1984. The learned Deputy Public Prosecutor argued that if the two Acts were read together, then the provision of s. 38 was applicable. As that section retained the power of the Public Prosecutor to give a written consent for a prosecution and as such written consent was given by the Public Prosecutor in this case (P1), the prosecution conducted by that officer was valid.

Let us first look at the relevance of this argument.

The Fisheries Act 1985 does not contain a provision regarding the power to prosecute similar to s. 38 of the Exclusive Economic Zone Act 1984 or the other laws mentioned earlier. So, for power to prosecute one has to fall back on the provisions of the Criminal Procedure Code. On the other hand, if the two Acts are read together, then s. 38 of the Exclusive Economic Zone Act 1984 comes into play in which case a prosecution conducted pursuant to a consent given in compliance with the provision of that section is valid.

Should the two Acts be read together? The first thing we notice regarding the two Acts is that there are cross references in the two Acts to each other and overlapping provisions.

The preamble of the Fisheries Act 1985, *inter alia*, reads:

> An Act relating to fisheries ... in **Malaysian fisheries waters** … (emphasis added).

Section 15(1) of the Fisheries Act 1985 under which the appellants were charged in this case concerns fishing or attempt to fish by foreign fishing vessels in Malaysian fisheries waters.

Section 2 of the Fisheries' Act 1985 defines "Malaysian fisheries waters" thus:

> "Malaysian fisheries waters" means maritime waters under the jurisdiction of Malaysia over which exclusive fishing rights or fisheries management rights are claimed by law and includes the internal waters of Malaysia, the territorial sea of Malaysia and the maritime waters comprised in the exclusive economic zone of Malaysia;

Section 2 of the Fisheries Act 1985 also defines the "exclusive economic zone":

> "exclusive economic zone" means the exclusive economic zone of Malaysia as determined in accordance with the Exclusive Economic Zone Act 1984 (Act 311);

We now look at the Exclusive Economic Zone Act 1984.

Section 2 defines "Malaysian fisheries waters":

> Malaysian fisheries waters means all waters comprising the internal waters, the territorial sea and the exclusive economic zone of Malaysia in which Malaysia exercises sovereign and exclusive rights over fisheries.

Section 2 and 3(1) define and determine the "exclusive economic zone" of Malaysia.

Section 2 also defines the "territorial sea":

Part III, containing sections 6, 7 and 8 is entitled "FISHERIES".

Section 6 provides:

> 6. The seas comprised in the exclusive economic zone shall be part of Malaysian fisheries waters.

Section 7 provides:

> 7. The Minister charged with responsibility for fisheries shall also be responsible for fisheries in the exclusive economic zone.

Section 8 provides:

> 8. Except as otherwise provided in this Act any written law relating to fisheries shall be applicable in the exclusive economic zone and on the continental shelf with such necessary modifications or exceptions as may be provided in an order made under section 42.

From these provisions, we see the interconnection between the two Acts. Matters, including offences, relating to fisheries are provided in the Fisheries Act 1985, which is understandable. The Exclusive Economic Zone Act 1984 does not provide for offences relating to fisheries. That is also understandable. It makes the Minister charged with responsibility for fisheries responsible for fisheries in the exclusive economic zone, and for that purpose the "authorised officer" is defined as including "fisheries officer", which is also understandable.

So, if an offence relating to fishing is committed in the Malaysian fisheries waters but also within the exclusive economic zone, it is the responsibility of the Minister charged with responsibility for fisheries. The authorised officers may exercise their powers provided by the Fisheries Act 1985 with a view to prosecution.

We now come to prosecution. Section 38 of the Exclusive Economic Zone Act 1984 provides:

> 38 (1) A prosecution for an offence under this Act **or any applicable written law** shall not be instituted except by or with the consent of the Public Prosecutor:
>
> Provided that a person who is to be charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any person so arrested may be remanded in custody or released on bail, notwithstanding that the consent of the Public Prosecutor too the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until that consent has been obtained.
>
> (2) When a person is brought before a court under this section before the Public Prosecutor has consented to the prosecution, the charge shall be read and explained to him but he shall not be called upon to plead thereto, and the provisions of the Criminal Procedure Code shall be modified accordingly. (emphasis added)

What is most significant are the words "or any applicable written law". The section does not only talk about a prosecution for an offence under "this Act."

"applicable written law" is defined in s. 2 of the Exclusive Economic Zone Act 1984:

> 2. In this Act, unless the context otherwise requires:
>
> "applicable written law" means any written law:
>
> (a) provided to be applicable in respect of the exclusive economic zone, continental shelf or both ... .

We have seen that in relation to fisheries, even though in the exclusive economic zone, the applicable written law is the Fisheries Act 1985. So, the words "A prosecution for an offence under ... any applicable written law ..." clearly refers, *inter alia*, to a prosecution for offences under the Fisheries Act 1985. We do not think there can be any other reasonable interpretation.

We shall now look closely at s. 38 and see whether, first, it is unconstitutional and secondly whether a written consent given pursuant to it is valid.

Regarding the first, sub-s. (1) provides that a prosecution shall not be instituted except by or with the consent of the Public Prosecutor. This provision is clearly distinguishable from the provisions of s. 126(2) of the Securities Industry Act 1993, s. 39(2) of the Securities Commission Act 1993 *(Repco Holdings Bhd.)*, s. 58(2) of the Immigration Act 1959/1963 *(Kyoshi Hasoi)*, s. 92A of the Sarawak Forests Ordinance *(Lee Ming)*, s. 44 of the Environmental Quality Act 1974 *(Queck Gin Hong)*, s. 116 of the Road Transport Act 1987 *(Rajendran a/l Gurusamy)* or even s. 28B(3) of the Trade Description Act 1972 *(Nguang Chan Sdn. Bhd.)*.

The material distinguishing feature is that the power of the Public Prosecutor is not taken away from him and given to somebody else. His powers remain intact. It is he and he alone who may institute or give consent for a prosecution. That is consistent with his powers under art. 145(3) of the Federal Constitution. In our judgment, s. 38(1) is constitutional. It is valid.

That being so, then the next question is whether a consent given by the Public Prosecutor to the Fisheries Officer, in this case, is a valid consent?

The answer is clearly in the affirmative. That section gives the Public Prosecutor power to give consent to prosecute. He has, in the exercise of that power given his consent. The officer, armed with that consent clearly is authorized to conduct the prosecution of the appellants. We are therefore of the view that the prosecution by the officer in this case is valid.

We do not think it is necessary to discuss the provisions of the Criminal Procedure Code. The Public Prosecutor did not have to rely on the provisions of the Criminal Procedure Code. The power is given by s. 38(1) of the Exclusive Economic Zone Act 1984. It is in the exercise of that power that he gave his consent.

In the circumstances, we dismiss the appeal and direct the learned magistrate to proceed with the trial.